Supreme Court, U. S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-933

Guardianship of

DIANNE L. TULLEY,
An Incompetent Person.

EDWIN ALFRED TULLEY, Guardian,
Petitioner,

vs.

DIANNE L. TULLEY, Ward,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeal, First Appellate District,
of the State of California

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PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeal, First Appellate District, of the State of California

Petitioner, Edwin Alfred Tulley, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, First Appellate District, Division Two, entered on October 10, 1978, and certified for publication.

OPINIONS BELOW

The opinion of the trial court, San Mateo County Superior Court, No. 55171, Honorable Gerald E. Ragan presiding, is printed in Appendix C hereto.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two, affirming the trial court, is printed in Appendix B hereto and is officially reported at 83 C.A.3d 699.

The judgment of the California Supreme Court, in postcard form, denying Edwin Alfred Tulley's Petition for Hearing in that Court and thus affirming the judgment of the Court of Appeal, is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeal was filed August 10, 1978. A timely Petition for Hearing in the California Supreme Court was filed on September 14, 1978 and subsequently denied on October 4, 1978. The judgment of the Court of Appeal and that of the California Supreme Court, in denying the Petition for Hearing, became final and was duly entered on October 10, 1978.

The jurisdiction of this Court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether, in light of the jurisdictional limitations imposed by the Legislature upon the probate departments of the State's superior courts, the California courts erred in holding that the Guardian's invocation of the equity power of the superior court is null and void.

2. Inasmuch as the holding and reasoning of *Stump v. Sparkman,* 98 Sup.Ct. 1099 (1978) is controlling, the California courts have denied the ward, Dianne L. Tulley, any forum from which the equitable relief sought could properly issue.

3. Clearly, the right to a medically justified surgical procedure is one which falls squarely within the zone of the fundamental right to privacy; therefore, the classification imposed by California Welfare and Institutions Code, Section 7254 overburdens and prevents the exercise of the ward's right to privacy and constitutes a denial of equal protection.

4. In the absence of a viable, less extreme, medical alternative, there is no compelling State interest that would be served in denying the ward the exercise of her fundamental right to undergo the proposed surgical procedure.

CONSTITUTIONAL PROVISIONS and STATUTES INVOLVED

United States Constitution:

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Ninth Amendment:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment; Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Welfare and Institutions Code, Section 7254:

The full text of California Welfare and Institutions Code, Section 7254, is set forth in Appendix D hereto.

STATEMENT OF THE CASE

On January 7, 1975, in the Superior Court of the State of California, County of San Mateo, Edwin Alfred Tulley, Petitioner herein, was duly appointed the Guardian of the Person and Estate of Dianne L. Tulley, his natural daughter.

The ward, Dianne L. Tulley, was not present at the hearing on January 7, 1975, pursuant to a certificate of her physician, filed with the Court, stating that she was unable to attend due to her mental and physical disability. The Court found the ward to be legally incompetent.

Thereafter, on June 17, 1975, together with Notice to all parties, a Petition for Instructions was filed with the above entitled Court stating that the ward was severely, developmentally disabled as a result of profound mental retardation; that due to her said incapacity, she was unable to comprehend or physically cope with her menstrual cycle; and, that it would be in the ward's best interests to have the surgical procedure of hysterectomy performed to alleviate the menstrual flow.

On May 19, 1977, the Guardian filed his Memorandum of Points and Authorities in Support of Petition for Instructions. Said Memorandum propounded, inter alia, the following:

A. California Welfare and Institutions Code, Section 7254, is the only governing statute and its operation effectively precluded the Guardian from obtaining the relief sought in his ward's stead;

B. That there exists a fundamental right to privacy which, in this circumstance, must be exercised by

the ward's legally appointed guardian; and, that no other person, nor the courts, could or should be permitted to exercise such right in the ward's stead, in contravention of the Guardian's decision, where said decision is supported by the overwhelming weight of sound medical advice;

C. That the probate department of the California superior court lacks the requisite jurisdiction of this particular guardianship matter; and

D. The superior court, under its judicial grant of general, legal and equitable jurisdiction, has the inherent power and jurisdiction to afford the relief sought.

In June, 1977, the matter was heard before the Honorable Gerald E. Ragan, Judge of the Superior Court, San Mateo County. The matter had been specially set and was not heard in probate by virtue of the statutory limitations with respect to the subject matter. The ward was represented by a private defender for the County of San Mateo.

Dr. Richard Levy, a licensed physician and psychiatrist, and Dr. James Meir, a licensed physician and diplomate of the American Board of Obstetrics and Gynecology, each testified to the trauma the ward sustains during her monthly menstrual period. Further, Dr. Meir testified as to the proposed surgical procedure of hysterectomy which would not "unsex" the ward, yet still achieve the desired cessation of the menstrual flow by removing the uterus only.

On June 13, 1977, the Court rendered its written opinion holding, inter alia, that, without question, the proposed hysterectomy was in the best interests of the ward, according to the weight of all testimony adduced at the hearing. However, the Court felt it did not have the requisite authority to authorize the Guardian to proceed, nor to grant civil and criminal immunity.

Notice of Appeal was timely filed and, thereafter, on May 10, 1978, the matter was argued orally before the Court of Appeal of the State of California. At this stage, the California State Public Defenders Office represented the ward.

In support of the Guardian's position, it was pleaded in the opening brief and argued orally that the ward is possessed of, despite her mental and physical disabilities, a constitutionally protected fundamental right to privacy, the exercise of which by the Guardian was being effectively constrained by the Court's denial of jurisdiction and the attendant authority.

It was further argued that the operation of California Welfare and Institutions Code, Section 7254, provided for the requested surgical procedure for one class of mentally and physically handicapped individuals while, at the same time, it denied the same procedure to another class of persons similarly afflicted, a denial of equal protection of the law.

Lastly, it was argued that due to the statutory limitations on jurisdiction imposed by the Legislature upon the probate departments of the State's superior courts, only those courts of general, legal and equitable jurisdiction have the authority to act on the merits of the Guardian's petition and provide the relief sought.

On August 10, 1978, the Court of Appeal rendered its written opinion. Although the Court mislabeled the Guardian's petition as one for "sterilization", it found that, without question, the proposed surgical procedure was in the best interests of the ward and was both medically and socially justified.

The Court of Appeal did not address itself to the merits of either the right of privacy issue as pleaded and argued or the issue of denial of equal protection under the application and operability of Welfare and Institutions Code, Section 7254. Nonetheless, the Court found that it lacked the statutory authority to grant the Guardian's petition and, further, that the sanctity of the ward's reproductive system and her right to bear and beget children was paramount to the otherwise medically and socially justified hysterectomy.

Although the Court of Appeal sympathized with the ward's ordeal and was apparently cognizant of the fact that the only applicable statute effectively barred her from the relief the Guardian sought, it felt that the Courts of the State were powerless to grant the petition. In sum, if any relief there be, it must be found in the Legislature and not within the broad and far reaching general, legal and equitable powers of our Courts.

On September 14, 1978, a timely Petition for Hearing in the California Supreme Court was filed. The same jurisdictional and substantive federal questions presented to the court of first instance and the Court of Appeal were set forth at length in the Petition for Hearing.

On October 4, 1978, the Guardian's Petition for Hearing was denied, thus affirming the Court of Appeal's decision

and making the Tulley "opinion" the controlling authority in the State of California on this complex and not uncommon question.

REASONS FOR ALLOWANCE OF THE WRIT

I

THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT WHICH NOW EXISTS, BY VIRTUE OF THE CALIFORNIA COURT'S OPINION IN THE WITHIN CAUSE, BETWEEN THAT COURT AND THIS COURT'S HOLDING IN STUMP v. SPARKMAN, INFRA.

In *Stump v. Sparkman,* 98 Sup.Ct. 1099, this Court was confronted with a unique question of judicial immunity whereby it was required to address itself to the issue of whether or not a court of original, exclusive, legal and equitable jurisdiction had the inherent authority to entertain and act upon a petition for sterilization of a minor in the absence of a controlling state statute.

After determining that the Indiana legislature vested, via judicial grant, original, exclusive, legal and equitable jurisdiction upon the subject court, this Court went on to mandate, at page 1105, as follows:

> "It is true that the statutory grant of general jurisdiction to the Indiana circuit court does not itemize types of cases those courts may hear and hence does not expressly mention sterilization petitions presented by the parents ... *But in our view, it is more significant that there was no Indiana statute and no case law* ...

> ***prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented . . . The statutory authority for the sterilization of institutionalized persons in the custody of the State does not warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents, . . . particularly where the parents have authority . . . to 'consent to and contract for medical or hospital care or treatment . . . including surgery.'"***
>
> "We agree . . . it appearing that neither by statute or case law has the broad jurisdiction granted to the circuit courts . . . been circumscribed to foreclose consideration of a petition for authorization of a minor's sterilization."
>
> "The Indiana law vested in Judge Stump the power to entertain and act upon the petition for sterilization." (Emphasis added).

Under the judicial grant of Article VI, Section 4 of the California State Constitution, the California superior courts are vested with original, exclusive, general, legal and equitable jurisdiction in all matters, with no itemization of cases which can be heard.

Under the same judicial grant, et seq., there is no provision for an autonomous, independent probate court wielding exclusive subject matter jurisdiction of all guardianship affairs to the exclusion of the superior court as a whole. Further, there is no statute prohibiting the superior court, a court of general jurisdiction, from entertaining a petition for sterilization or a petition for a procedure that, of medical necessity, results in a sterile state. Indeed, the only applicable statute, welfare and Institutions Code, section

7254, provides for superior court review of such a petition. Thus, there is no relevant difference between the scope of the judicial grant to the Indiana court in *Sparkman,* supra, and that bestowed upon the California superior courts.

However, the Court of Appeal found that, in the absence of a controlling statute:

> ". . . the purported invocation of the equity power of the superior court must be deemed null and void. It is well established that the probate court has exclusive jurisdiction of guardianship proceedings, and after a guardian has been appointed, the probate court has continuous jurisdiction over the guardian and the administration of the ward's affairs."

In support of this unfounded position, the lower court cited *Browne v. Superior Court,* 16 Cal.2d 593 (1940) and *Guardianship of Kemp,* 43 Cal.App.3d 758 (1974).

Browne merely stands for the familiar proposition that where one *county* superior court acquires original jurisdiction of a guardianship matter, it retains that jurisdiction to the exclusion of another *county's* superior court until the proceeding is final, terminated, or transferred for cause. The issue in *Browne* was *not* inter-departmental assignment of designated matters for the sake of convenience or judicial expediency.

Kemp presented an identical factual situation to the California court and, as here, the Guardian's petition was denied for lack of jurisdiction. *Kemp* preceeded *Sparkman,* thus its dubious "authority" must fall under the mandates of *Sparkman,* supra.

California Welfare and Institutions Code, Section 7254, provides for the sterilization of persons in the custody of the State. However, the California courts *have created the inference* that its superior courts, courts of general jurisdiction, have no power to act upon this Guardian/parent's petition, where this ward is under the control and custody of her Guardian/parent and where the Guardian/parent, under *California Probate Code, Section 1460,* has the authority to consent to and contract for medical and hospital care or treatment, including surgery when indicated, on behalf of the ward.

II

THERE IS NO COMPELLING STATE INTEREST SERVED BY THE COURTS INTERPRETATION OF THE SUBJECT STATUTE, WHICH EFFECTIVELY PRECLUDES THE EXERCISE OF THE WARD'S FUNDAMENTAL RIGHT TO PRIVACY: SUCH CONSTITUTES A DENIAL OF EQUAL PROTECTION.

Although the Constitution does not explicitly mention any right to privacy, this Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In a variety of contexts, this Court has found at least the roots of that right in the *First Amendment; Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); in the *Fourth* and *Fifth Amendments; Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Katz v. U.S.,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); in the *Ninth Amendment, Griswold v. Connecticut,*

Id., (Goldberg, J., concurring); and in the concept of liberty guaranteed by the first section of the *Fourteenth Amendment.* The strength of these decisions make it clear that only personal rights that are considered "Fundamental" can be included in this guarantee of personal privacy.

It is also clear that these decisions do not limit or restrict this right to privacy, but instead the Court has indeed extended this right to include the right of a woman to terminate a pregnancy, *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973). By logical extension, the right of an individual, such as the ward herein, to have necessary medical treatment which would alleviate the menstrual problem is a right which is so personal that it would be included in the zone of privacy, *Hathaway v. Worcester City Hospital,* 475 F.2d 701 (1973).

The California legislature has recognized the necessity of providing for the medical well-being of individuals who are afflicted with the mental and physical problems that the ward herein must bear. Section 7254 of *Welfare and Institutions Code* authorizes a sterilization operation for individuals in a position similar to that of the ward. However, as this statute has been interpreted by the Appellate Court and the California Supreme Court, it limits the protection and provisions of this statute to persons who have been committed to a state hospital and who are currently under the jurisdiction of the State Department of Mental Health.

The only distinction between the ward and any other person who falls within the purview of the statute is that

the ward is not under the jurisdiction of the State Department of Mental Health. The California Courts felt bound by the classification imposed by the statute and denied the Guardian's petition. Thus, the lower courts were compelled to deny the exercise of the ward's right to privacy, based upon the consent of the Guardian, because the ward is not a member of the class of state institutionalized wards.

It is clear that *Section 7254* of the *Welfare and Institutions Code* creates two segregated classes of individuals who may require the proposed surgical procedure; individuals who are institutionalized in a state facility and those who are not. The first class is permitted and the second class denied a medical operation which is necessary for the well-being of the individual solely because the individual is not under the jurisdiction of the state.

Inasmuch as the ward is incapable to giving consent and the lower courts have not permitted the grant of immunity based upon the consent of the Guardian, so that the operation can be performed, the right of the ward to receive this needed procedure is eliminated. The restrictions provided for by the statute, and upheld by the lower courts, effectively frustrates the exercise of the ward's right to privacy and is a denial of her right to equal protection of the laws, *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600.

All procedural safeguards provided for in the statute have been afforded the ward in the lower courts. The conclusion is inescapable, despite full conformity with the requisite due process guarantees, the ward is denied the

protection sanctioned by Welfare and Institutions Code, Section 7254.

Certainly, some state regulation is appropriate in the area of right to privacy. Safeguarding health and maintaining medical standards are legitimate state interests which may effect one's exercise of the right to privacy. However, any regulation of a fundamental right must be supported by a showing of some compelling state interest that would be served. *Roe v. Wade,* supra.

In the instant matter, the only compelling interest that can be served by strictly interpreting the subject statute is that all procedural safeguards are met to ensure that an unnecessary operation not be conducted. The government interest in providing relief for the mentally retarded in accordance with the statute is clearly a legitimate goal. However, there is no government interest to be served in denying the ward that same equal protection.

The basis of our constitutional government is to protect and promote the rights and interests of the individuals, subject only to the rights of others. The record below is replete with evidence as to the trauma and fear that the ward sustains during her menstrual period. No compelling state interest will be served in denying the ward the sought for relief. To the contrary, the State of California will be deemed to have shirked its duty to the ward, under its status as parens patriae, if it continues to deny her right to privacy, her right to equal protection of the laws and forces her to endure, for years to come, her present physical and emotional hardships.

CONCLUSION

This, the United States Supreme Court, is the last forum before which Dianne L. Tulley's cause can be brought. A conflict now exists between this Court and those of California and an important, not uncommon issue remains without resolution. Dianne L. Tulley's unfortunate life can be altered for the better. Before she is compelled to continue to live as she does, someone must listen.

For the aforesaid reasons, it is respectfully prayed that a Writ of Certiorari be granted.

Dated: Burlingame, California,

December 7, 1978.

Respectfully submitted,

VORSATZ & VORSATZ
FRANK C. VORSATZ
PAUL F. VORSATZ
Attorneys for Petitioner

(Appendices Follow)

Appendices

Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Oct 4, 1978

I have this day filed Order—HEARING DENIED

In re: 1 Civ. No. 42514

Guardianship of Tulley

Respectfully,

G. E. Bishel
Clerk

Appendix B

Certified for Publication

In the Court of Appeal
of the State of California

First Appellate District

Division Two

1 Civ. No. 42514
(Sup.Ct. No. 55171)

Guardianship of Dianne L. Tulley, an Incompetent Person.

EDWIN ALFRED TULLEY, Guardian,
Petitioner and Appellant.

vs.

DIANNE L. TULLEY,
Objector and Respondent.

[Filed August 10, 1978]

OPINION

Petitioner, Edwin Alfred Tulley, appeals from the trial court's ruling denying his request to order the sterilization of his natural daughter and ward, Dianne L. Tulley (hereafter Dianne or ward). The facts are virtually undisputed, and may be briefly stated as follows:

On January 7, 1975, appellant was duly appointed the guardian of the person and estate of Dianne. On June 17, 1975, appellant filed a petition for instructions, stating *inter alia* that the ward was severely disabled because of profound mental retardation; that due to her incapacity she was unable to comprehend her personal needs or to cope with her menstrual cycle; and that it would be in the ward's best interest that she be surgically sterilized.

The matter was set for hearing on June 2, 1977. The evidence received at the hearing provided factual support to the allegations of the petition. Thus, the record showed that Dianne was suffering from cerebral palsy with brain damage. At age 20 she had the intelligence and comprehension of a three-year-old child. As a consequence, she was not only unable to comprehend the normal bodily function of the menstrual cycle, but was also incapable of attending to its attendant sanitary needs.

The medical testimony ruled out the probability that the severe retardation would change to any extent in the future. It was further established that although Dianne was capable of engaging in sexual intercourse, the potential pregnancy resulting therefrom would cause psychiatric harm. Based upon these facts, the medical experts concluded that a hysterectomy operation, which would remove the uterus without "unsexing" the patient, would be the right step to take and would also be in the best interest of the ward. While agreeing that the proposed sterilization would be justified both medically and socially and would serve the best interest of Dianne as well, the trial court felt compelled to deny the petition on the ground that the court was not authorized to approve or order

the involuntary sterilization of an incompetent person who is unable to give her consent.

Since the facts of the case are undisputed, the matter to be decided on appeal is purely legal. Stated in broad terms, it calls for a determination whether in the absence of statute the court is authorized to order the involuntary sterilization of a mentally incompetent ward where, as here, the guardian consents to such operation, and the procedure suggested is justified both medically and socially. Appellant assiduously argues that in such an instance the court, even in the absence of specific statutes, should possess the legal authority to order sterilization as a matter of common law and/or as a constitutional mandate. We disagree with appellant and affirm the order.

To begin with, it has been widely recognized that sterilization (even if medically and socially indicated) is an extreme remedy which irreversibly denies a human being the fundamental right to bear and beget a child. Accordingly, the overwhelming majority of courts hold that the jurisdiction to exercise such awesome power may not be inferred from the general principles of common law, but rather must derive from specific legislative authorization. The position of case law is thus clear that in the absence of specific statutory authority the courts may not order the sterilization of a mentally defective person (Sparkman v. McFarlin (7th Cir. 1977) 552 F.2d 172, 175, reversed on other grounds in Stump v. Sparkman (1978) ..... U.S. ..... (46 U.S.L.Week 4253); Wade v. Bethesda Hospital (S.D. Ohio 1971) 337 F.Supp. 671, 674; Frazier v. Levi (Tex.Civ. App. 1969) 440 S.W.2d 393, 394; Holmes v. Powers (Ky. App. 1968) 439 S.W.2d 579; In Interest of M.K.R. (Mo. 1974) 515 S.W.2d 467, 470; 74 A.L.R.3d 1210, 1212-1213).

The California law is in full accord with the aforestated principles. The case in point is Guardianship of Kemp (1974) 43 Cal.App.3d 758, where, similar to the case at bench, respondent, the guardian of his incompetent adult daughter, petitioned the court to authorize and order the therapeutic sterilization of the ward. The petition alleged (and the medical evidence bore out the proposition) that the ward was capable of engaging in sexual activities, but was mentally unable to understand the result and implications of such activity; that the pregnancy of the ward would be an obvious probable result of such action; and that the mental deficiencies of the incompetent mother might be transmitted to any child born to her. The probate court found on the basis of this evidence that the sterilization of the ward was justified and issued an order authorizing the surgical procedure. In reversing the order, the reviewing court pointed out that there is no case law in California authorizing the sterilization of a mentally incompetent ward, nor is there any statute which would specifically confer such power upon the probate court. The only statute that provides for the sterilization of certain mentally disordered or mentally retarded persons is Welfare and Institutions Code,[1] section 7254, which, however, allows said drastic procedure only with respect to persons committed to mental hospitals and only under the limited conditions specified in the statute.[2] In holding that the order of the

[1]Unless otherwise indicated, the references will be made to the California Welfare and Institutions Code.

[2]Section 7254 provides as follows: *"The provisions of this section apply to any person who has been lawfully committed or admitted to any state hospital for the mentally disordered or mentally retarded and who is afflicted with, or suffers from, any of the following conditions:*

"(a) Mental disease which may have been inherited and is likely to be transmitted to descendants.

probate court authorizing sterilization was in excess of its jurisdiction, the court placed special emphasis on the circumstances that the out-of-state authorities almost unanimously proscribed the involuntary sterilization of an incompetent person based on the common law, and that by the enactment of section 7254 the California Legislature strictly limited the scope of legally authorized sterilizations, set up stringent procedural safeguards, and made them *sine qua non* to any sterilization carried out by the aid of the court. As the appellate court put it, "In view of the fact that the Legislature has prescribed a comprehensive scheme requiring examination, notice, administrative hearings, administrative review, and judicial review, *it may be concluded that*

"(b) Mental retardation, in any of its various grades.

"(c) Marked departures from normal mentality.

"The State Department of Mental Health, with respect to a patient or resident in a state hospital or home under its jurisdiction, and the State Department of Development Services with respect to a patient or resident in a state hospital or home under its jurisdiction, *upon compliance with the provisions of this section, may cause any such person to be sterilized* by the operation of vasectomy upon the patient if a male and of salpingectomy if a female or any other operation or treatment that will permanently sterilize but not unsex the patient. *When the superintendent of the state hospital* or state home *is of the opinion that a patient* who is afflicted with or suffering from any of the conditions specified in this section *should be sterilized, he shall certify such opinion to the director of the department* having jurisdiction over the hospital or home *and shall at the same time give written notice of such certification to the patient* and to his known parents, spouse, adult children, *or guardian,* if any, by registered mail to their last known address. If the patient has no known relatives or guardian, such notice shall be given to the person who petitioned for the patient's commitment. *Such notice shall further state that written objection or written consent to the proposed sterilization, should be filed with the director of the department* having jurisdiction over the hospital or home at his office in Sacramento within 30 days by the patient, spouse, next of kin or guardian.

"When a written consent is filed, or if no objection is filed within the 30 days, the director of the department having jurisdiction over the hospital or home, *if satisfied that the sterilization will not unduly endanger the patient's health and that it is a proper case for sterilization, may authorize the superintendent to proceed with the steri-*

the Legislature did not intend that sterilization of the mentally retarded was to be carried out without meeting the requirements imposed by this statute (Welf. & Inst. Code, § 7254." (Guardianship of Kemp, supra, 43 Cal.App.3d at p. 763; emphasis added.)

In the case at bench, it stands undisputed that, at the time the petition for instructions was filed and the court order was made, Dianne was not committed or admitted to any state hospital for the mentally disordered or mentally retarded, and also that none of the steps prescribed by sec-

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lization of the patient. The director may cause such examination of the patient and other inquiry to be made as he deems advisable before issuing the authorization to the superintendent.

"*If a written objection is filed* within the 30 days by the patient, his spouse, next of kin, or guardian, and in those cases where the patient has no known relatives or guardian, *the proposed sterilization shall not be authorized or performed until the director of the department* having jurisdiction over the hospital or home *has determined the matter. He shall make full inquiry into the case, and may hold a hearing* at the institution at which hearing the patient shall be present, and the objecting party and others interested on behalf of the patient may be heard. If the decision of the director is that the patient shall not be sterilized, he shall so order and notify the superintendent, the patient and the objecting party. *If the decision of the director is that the patient should be sterilized, he shall send notice of such decision to the patient,* his known parents, spouse, adult children, *and guardian,* if any, and the objecting party, by registered mail to their last known address. *Such notice shall further state that any such party has the right within 30 days to petition the superior court* of the county in which the institution is situated or of the county of the patient's residence *for a review of the decision.*

"*If such petition is filed within 30 days,* and a true copy thereof is served upon the director of the department having jurisdiction over the hospital or home, *the patient shall not be sterilized unless and until the court, after hearing, issues an order authorizing the sterilization of the patient* in accordance with the provisions of this section. If such petition is not filed in court within 30 days, the director may authorize the superintendent to proceed with such sterilization. The sterilization of a patient in accordance with the provisions of this section, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any persons participating in the operation liable either civilly or criminally."

tion 7254 were followed. The conclusion is thus inescapable that the case falls within the purview of *Kemp,* and the order denying the approval of sterilization must be sustained for this reason alone.

Appellant nonetheless insists that *Kemp* is not controlling in the instant case. The gist of appellant's argument is that *Kemp* was decided on the narrow ground that the superior court, siting in probate, was of limited jurisdiction which, in the absence of statutory authority, was not empowered to order the guardian to consent to the sterilization of the adult incompetent ward. By contrast, argues appellant, in the case at bench the superior court proceeded as a court of general jurisdiction and thus possessed an inherent and unfettered equity power to serve and promote the interest and welfare of the incompetent (cf. Guardianship of Reynolds (1943) 60 Cal.App.2d 669, 675), which necessarily included the power to consent to the sterilization operation at issue which was manifestly in the best interest of the ward. Appellant's contention must be rejected for at least two major considerations.

First, the general proposition of law that in the absence of a specific statute the courts may not order the sterilization of incompetent persons, is not predicated on the eventuality whether the tribunal proceeds as a probate court or a court of general jurisdiction. As mentioned before, the underlying rationale of the general rule is the obvious concern that the awesome power to deprive a human being of his or her fundamental right to bear or beget offspring must be founded on the explicit authorization of the Legislature rather than a mere inference deduced from the general principles of common law or the canons of equity jurisprudence. As the court remarked in Sparkman v. McFarlin,

supra, 552 F.2d at page 176: *"Although the courts ought not to be discouraged from creating innovative legal remedies to meet the changing social conditions, they may not use the power to create new decisional law to order extreme and irreverisble remedies such as sterilization* in situations where the legislative branch of government has indicated that they are inappropriate." (Emphasis added.) Consistent with these precepts, the proscription against court ordered sterilization is pronounced in general terms without regard to the composition or capacity of the tribunal proceeding in the matter.

Second, appellant's argument must fail for the reason that the purported invocation of the equity power of the superior court must be deemed null and void. It is well established that the probate court has exclusive jurisdiction of guardianship proceedings, and after a guardian has been appointed, the probate court has continuous jurisdiction over the guardian and the administration of the ward's affairs (Guardianship of Kemp, supra, 43 Cal.App.3d 758, 761; Browne v. Superior Court (1940) 16 Cal.2d 593, 598).

Appellant's alternative argument that the trial court's refusal to grant the relief requested violated Dianne's constitutional right to privacy (cf. Roe v. Wade (1973) 410 U.S. 113) does not require a lengthy discussion. Without going into the merits of this argument, suffice to say that the California statute does not erect an absolute bar to the sterilization of a mentally disordered or mentally retarded person. On the contrary, section 7254, as indicated before, does allow sterilization of such persons if they are inmates of a mental hospital and if the procedural safeguards circumscribed in the statute are adequately met. Appellant does not argue that the safeguards laid down in the statu-

tory enactment are overly burdensome or unreasonable or that the statute is unconstitutional for any other reason. Just the opposite, appellant concedes that the preservation of one's bodily reproductive functions is a fundamental right, and the termination thereof constitutes a serious invasion of the sanctity of the person. It is, of course, unquestionable that a state does have, and may properly assert, an interest in safeguarding health, in maintaining medical standards and in protecting potential life (Roe v. Wade, supra, 410 U.S. at p. 154). It is likewise beyond dispute that when, as here, the deprivation of rights comprises a serious invasion of one's privacy and well being, the state is not only entitled, but also mandated to provide adequate procedural safeguards to ensure the avoidance of potential abuses (cf. Wyatt v. Aderholt (M.D. Ala. N.D. 1974) 368 F. Supp. 1383).

In sum, although we sympathize with appellant's cause and are well aware that institutionalization to which the sterilization procedure is presently tied is not easy to obtain in many instances, we are bound by the statute and case precedents pertaining thereto, and may not encroach upon the province of the Legislature, which alone is authorized to bring about the suggested change by adding to, or amending, the existing statute.

The order is affirmed.

CERTIFIED FOR PUBLICATION

Kane, J.

We concur:

Taylor, P.J.

Rouse, J.

Appendix C

In the Superior Court of the State of California
in and for the County of San Mateo

No. 55171

In the Matter of the Guardianship of the Person and Estate of
Dianne L. Tulley,
An Incompetent Person.

In this case, the Court must determine two legal issues. Firstly, whether it has the authority to grant permission to the Guardian (who is also the natural father of the 20 year old female ward) to make a decision, based on sound medical advice whether or not to have the incompetent ward sterilized. Secondly, if the sterilization is performed, does the Court have the power to grant civil and criminal immunity to the guardian, doctors and others involved in the decision and operation.

The Court makes certain factual findings as follows:

(1) Without question it would be in the best interests of the incompetent ward, socially, medically and emotionally to have the sterilization performed.

(2) After careful thought and reflection, the Guardian and father believes and recommends sterilization be performed.

(3) Very competent medical examinations have been performed and the unanimous emphatic opinion of the doctors, including a psychiatrist and gynecologists, is that sterilization definitely should be performed.

(4) The proposed sterilization, assuming no problems with the ovaries, would be to remove the uterus only, which would not affect hormone balance nor would it change any sexual abilities or desires. It would prevent any possibility of pregnancy and eliminate menstruation.

(5) It is virtually a certainty that the ward will not show any improvement in her mental condition, and will never function at a level over approximately 3 years old.

(6) The ills to be corrected by the sterilization is to avoid any possibility of pregnancy, it being noted that the ward is quite attractive and well developed according to the testimony of the father. Also, it would eliminate the menstrual period which the ward cannot functionally take care of.

Philosophically, it is very dangerous to relax the general laws which proscribe compulsory sterilization. We must be extremely careful to insure that the Courts, Legislature and/or Executive branches of government do not use compulsory sterilization to accomplish unwanted and undesirable results in society as a whole, such as genocide or any similar evil. If exceptions are allowed in unusual cases, who is to say where the limit line is to be drawn in future years.

All rational, thinking people in our society find the general concept of mandatory or compulsory sterilization of a viable human repugnant to their religious, moral and ethical beliefs. In fact, it is only in recent times that voluntary sterilization has become socially and legally acceptable in many circles.

With this caution in mind, the Court has searched for legal authority which would grant this Court the power to

allow the Guardian to make his decision on the sterilization, and grant immunity to all concerned from any subsequent Civil or Criminal liability.

Without question, the Court has the inherent power, which has been established through a long line of cases, to not only allow but in fact to order certain medical procedures to save life or limb. And it probably has the power (although not ruled on in California) to allow medical authorities and family to remove life sustaining equipment in certain cases. Even recognizing this broad authority, this Court finds it does not have the power to give its official imprimatur to the Guardian under the facts of this case, nor does it have the power to grant civil or criminal immunity to those concerned with the sterilization.

To allow such decision to be made by the Guardian would be tantamount to involuntary sterilization of the incompetent, i.e., without her actual consent, which of course is and always will be impossible to get. The Court truly empathizes with the parents and the doctors in this case, and has a strong desire to particularize and allow the operation, but there remains a necessity to generalize for protection of the commonweal.

If relief is to be obtained in such a case, it must come through the Legislature.

Dated: June 13, 1977

/s/ Gerald E. Ragan
Judge of the Superior Court

Appendix D

WELFARE AND INSTITUTIONS CODE 7254

Sterilization of patients afflicted with inherited mental disease, mental retardation, or marked departures from normal mentality: Procedure

The provisions of this section apply to any person who has been lawfully committed or admitted to any state hospital for the mentally disordered or mentally retarded and who is afflicted with, or suffers from, any of the following conditions:

(a) Mental disease which may have been inherited and is likely to be transmitted to descendants.

(b) Mental retardation, in any of its various grades.

(c) Marked departures from normal mentality.

The State Department of Mental Health, with respect to a patient or resident in a state hospital or home under its jurisdiction, and the State Department of Developmental Services with respect to a patient or resident in a state hospital or home under its jurisdiction, upon compliance with the provisions of this section, may cause any such person to be sterilized by the operation of vasectomy upon the patient if a male and of salpingectomy if a female or any other operation or treatment that will permanently sterilize but not unsex the patient. When the superintendent of the state hospital or state home is of the opinion that a patient who is afflicted with or suffering from any of the conditions specified in this section should be sterilized, he shall certify such opinion to the director of the department having jurisdiction over the hospital or home and shall at the same time

give written notice of such certification to the patient and to his known parents, spouse, adult children, or guardian, if any, by registered mail to their last known address. If the patient has no known relatives or guardian, such notice shall be given to the person who petitioned for the patient's commitment. Such notice shall further state that written objection or written consent to the proposed sterilization, should be filed with the director of the department having jurisdiction over the hospital or home at his office in Sacramento within 30 days by the patient, spouse, next of kin or guardian.

When a written consent is filed, or if no objection is filed within 30 days, the director of the department having jurisdiction over the hospital or home, if satisfied that the sterilization will not unduly endanger the patient's health and that it is a proper case for sterilization, may authorize the superintendent to proceed with the sterilization of the patient. The director may cause such examination of the patient and other inquiry to be made as he deems advisable before issuing the authorization to the superintendent.

If a written objection is filed within the 30 days by the patient, his spouse, next of kin, or guardian, and in those cases where the patient has no known relatives or guardian, the proposed sterilization shall not be authorized or performed until the director of the department having jurisdiction over the hospital or home has determined the matter. He shall make full inquiry into the case, and may hold a hearing at the institution at which hearing the patient shall be present, and the objecting party and others interested on behalf of the patient may be heard. If the decision of the director is that the patient shall not be

sterilized, he shall so order and notify the superintendent, the patient and the objecting party. If the decision of the director is that the patient should be sterilized, he shall send notice of such decision to the patient, his known parents, spouse, adult children, and guardian, if any, and the objecting party, by registered mail to their last known address. Such notice shall further state that any such party has the right within 30 days to petition the superior court of the county in which the institution is situated or of the county of the patient's residence for a review of the decision.

If such petition is filed within 30 days, and a true copy thereof is served upon the director of the department having jurisdiction over the hospital or home, the patient shall not be sterilized unless and until the court, after hearing, issues an order authorizing the sterilization of the patient in accordance with the provisions of this section. If such petition is not filed in court within 30 days, the director may authorize the superintendent to proceed with such sterilization. The sterilization of a patient in accordance with the provisions of this section, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any persons participating in the operation liable either civilly or criminally.

Amended by Stats 1971 ch. 1593 § 441, operative July 1, 1973; Stats 1977 ch. 1252 § 658, operative July 1, 1978.